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Guy M. Hicks
General Counsel

March 27, 2000
EXECUTIVE SECRETARY

VIA HAND DELIVERY

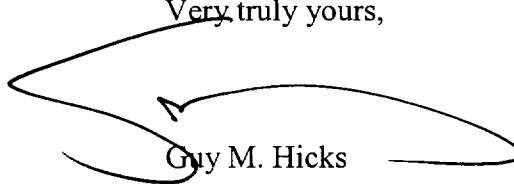
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of NEXTLINK TENNESSEE LLC for Arbitration of
Interconnection with BellSouth Telecommunications, Inc.*
Docket No. 98-00123

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Reply Memorandum in Support of BellSouth Telecommunications, Inc.'s Motion to Reject Certain Provisions of Interconnection Agreement. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,



Guy M. Hicks

GMH:ch
Enclosure

POSTED
5-28-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

*In re: Petition of NEXTLINK TENNESSEE LLC for Arbitration of
Interconnection with BellSouth Telecommunications, Inc.*

Docket No. 98-00123

REPLY MEMORANDUM IN SUPPORT OF BELL SOUTH
TELECOMMUNICATIONS, INC.'S MOTION TO REJECT CERTAIN
PROVISIONS OF INTERCONNECTION AGREEMENT

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") has moved the Tennessee Regulatory Authority ("Authority") to reject two provisions in the interconnection agreement between BellSouth and NEXTLINK Tennessee, Inc. ("NEXTLINK") – the definition of local traffic and the terms for multiple tandem interconnection. While opposing BellSouth's motion, NEXTLINK never comes to grips with the fact that these two provisions are inconsistent with the standards for approval of interconnection agreements set forth in 47 U.S.C. § 252(e)(2). Instead, NEXTLINK relies upon the doctrine of "judicial estoppel [sic]," which does not apply, and argues that the Authority cannot revisit issues decided in the arbitration, even though NEXTLINK took precisely the opposite point of view seven months ago. Notwithstanding NEXTLINK's arguments to the contrary, the Authority should grant BellSouth's motion and reject the two provisions at issue.

II. DISCUSSION

A. The Doctrine of Judicial Estoppel Does Not Apply.

There is no merit to NEXTLINK claim that BellSouth should be judicially estopped from challenging the two provisions in the interconnection agreement at issue because BellSouth "agreed to the contract language...." NEXTLINK Brief at 3. With respect to the definition of

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local traffic (General Terms and Conditions - Part B), this language was inserted in the interconnection agreement at the direction of the Authority in resolving Issue 5 in the arbitration. *See* First Order of Arbitration Award, *In re: Petition of NEXTLINK Tennessee LLC for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. 98-00123, at 15 (May 18, 1999) (ordering “that, consistent with the Authority’s decision in Docket 98-000118, the Parties are required to treat traffic that originates from and terminates to enhanced service provider or an ISP as local traffic subject to the payment of reciprocal compensation”). BellSouth and NEXTLINK were directed to submit an interconnection agreement that incorporated the Arbitrators’ decisions. That BellSouth did as it was ordered to do does not mean that BellSouth “voluntarily agreed” with the Arbitrators’ decision on the local traffic issue or should be estopped from challenging that decision. *See, e.g., AT&T Communications of Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 670 (E.D.N.C. 1998) (concluding that it would “stretch the bound of imagination” to find a voluntary agreement where BellSouth “was merely adhering to established FCC rules”); *US West Communications, Inc. v. WorldCom Techs., Inc.*, 31 F. Supp. 2d 819, 826 (D. Or. 1998) (“[the incumbent carrier] did not waive its objections by agreeing to terms mandated by a then-binding FCC order”).

With respect to the terms for multiple tandem interconnection (Attachment 3, Section 3.9.3), BellSouth has submitted evidence clearly establishing that it never agreed to this language that was inserted by NEXTLINK (either intentionally or inadvertently) without BellSouth's consent. *See* Borne Affidavit, ¶¶ 8-13. In the face of such evidence, NEXTLINK has made no attempt to explain how this language got into the Parties’ interconnection agreement. In any event, BellSouth cannot be judicially estopped from challenging language to which it never agreed.

B. BellSouth Is Not Seeking Reconsideration of the Reciprocal Compensation Issue

NEXTLINK's argument that BellSouth should not be permitted to "reargue" or seek "reconsideration" of the reciprocal compensation issue completely misses the mark. NEXTLINK Brief at 4. BellSouth is not seeking reconsideration of any decision by the Arbitrators, but rather is asking that the Authority consider the local traffic definition in the Parties' interconnection agreement in light of the FCC's *Declaratory Ruling* in CC Docket No. 96-98 (Feb. 26, 1999). NEXTLINK has previously insisted that the Authority has the power "to ensure that an arbitrated agreement is consistent with federal law after the arbitration has been completed....," and NEXTLINK does not bother to explain the reason for its apparent change of heart. See NEXTLINK Brief on TRA Jurisdiction at 1 (filed August 31, 1999).

In its *Declaratory Ruling*, the FCC held that Internet traffic is "non-local interstate traffic" and issued a notice of proposed rulemaking to establish an inter-carrier compensation mechanism for such traffic. *Declaratory Ruling*, ¶ 26, n.87 & ¶ 28. Pending the completion of this rulemaking, the FCC purported to authorize state commissions to require the payment of reciprocal compensation for Internet traffic as an "interim" measure. *Id.* ¶ 27.

The Authority recently considered the issue of inter-carrier compensation for Internet traffic in light of the FCC's *Declaratory Ruling* in the Time Warner arbitration, Docket 99-00797. The Authority voted unanimously "that reciprocal compensation is an appropriate interim method to be used to recover the costs associated with the delivery of ISP-bound traffic pending completion of the FCC's rulemaking with regard to this traffic." Transcript of Proceedings, *In re: Petition For Arbitration of an Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of the MidSouth, L.P.*, at 6 (March 14, 2000).

The Authority's decision in the Time Warner arbitration reflects that the payment of reciprocal compensation for Internet traffic is an "interim" measure that should apply only until the FCC adopts rules establishing an inter-carrier compensation mechanism for such traffic. This issue should be resolved in the same manner in the context of NEXTLINK's interconnection agreement with BellSouth, and the Authority should order NEXTLINK and BellSouth to conform their interconnection agreement consistent with the Authority's decision in the Time Warner arbitration.

B. BellSouth Is Not Seeking To "Arbitrate" The Multiple Tandem Access Issue

NEXTLINK's argument that BellSouth is "barred by federal law from arbitrating" the multiple tandem access issue is misguided. NEXTLINK Brief at 5. BellSouth is not asking the Authority to arbitrate anything. Rather, BellSouth is asking the Authority to apply the statutory standards set forth in 47 U.S.C. § 252(e)(2)(A) and reject the multiple tandem access interconnection language currently set forth in the Parties' interconnection agreement because it is inconsistent with the public interest.

The reason that the current language is inconsistent with the public interest is because it omits critical language making clear that access traffic will not be routed through multiple access tandems – an omission that NEXTLINK makes no attempt to explain. NEXTLINK also never bothers to explain why it would even want access traffic routed through multiple access tandems, even assuming it were technically feasible to do so.

NEXTLINK proposes that the Authority put off deciding until another day whether routing access traffic through multiple access tandems is technically feasible, since the interconnection agreement contains a provision that does not require technically infeasible "trunking options." NEXTLINK Brief at 6. Accepting NEXTLINK's proposal will only delay

the inevitable – BellSouth contends that routing access traffic through multiple access tandems is not technically feasible, and NEXTLINK apparently contends otherwise. No purpose would be served in adopting language in an interconnection agreement that is only going to be the source of a dispute down the road, particularly given the questionable circumstances surrounding how that language got into the interconnection agreement in the first place.

Furthermore, in addition to the technical feasibility issue, the routing of access traffic through multiple access tandems, even if technically feasible, can delay transmissions and degrade the quality of service provided to interexchange carriers – an issue NEXTLINK conveniently fails to address. That end-user customers could be adversely affected by routing access traffic through multiple access tandems is the reason the networks of the Regional Bell Operating Companies were constructed to prevent such an arrangement. NEXTLINK does not and cannot explain how an interconnection arrangement that could adversely affect end-user customers is in the public interest.

NEXTLINK argues that it is irrelevant that the multiple tandem access language currently in the parties' interconnection agreement is inconsistent with BellSouth access tariffs because, according to NEXTLINK, "The whole purpose of an arbitration is to fix terms and conditions which are *not* found in BellSouth's tariff." NEXTLINK Brief at 6 (emphasis in original). This argument is seriously flawed. First, the purpose of an arbitration is ensure compliance with the requirements of Sections 251 and 252 of the Act. None of these provisions has anything to do with the "terms and conditions" for access traffic.

Second, as evidenced by the language in BellSouth's access tariffs, interexchange carriers purchasing access services from BellSouth clearly understand and expect that their access traffic will be routed through only a single access tandem. However, if NEXTLINK had its way and

even assuming it were technically feasible, BellSouth would be required to route toll calls from NEXTLINK's customers through multiple access tandems, including customers who had selected AT&T or MCI as their long distance carrier. Thus, the problem of routing access traffic through multiple access tandems affects carriers other than NEXTLINK and BellSouth and presents a host of billing and network engineering issues, which NEXTLINK would prefer that the Authority simply overlook.

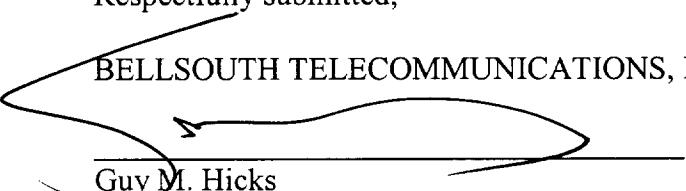
The language at issue concerning multiple tandem access should never have been included in the parties' interconnection agreement in the first place. Now that it is there, however, the Authority should reject that language as inconsistent with the public interest and should direct the parties to negotiate mutually acceptable language setting forth the terms and conditions for multiple tandem access, as BellSouth has done with numerous other local carriers.

III. CONCLUSION

For the foregoing reasons, the Authority should grant BellSouth's Motion and should reject the two provisions at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2000, a copy of the foregoing document was served on the parties of record, via U. S. Mail, postage pre-paid, addressed as follows:

☒ Hand
☐ Mail
☐ Facsimile

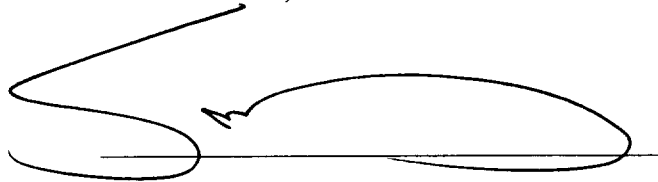
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A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the certifier.